No.

In the Supreme Court of the United States

THE LOCAL CHURCH, ET AL.,

Petitioners,

v.

HARVEST HOUSE PUBLISHERS,
JOHN ANKERBERG, AND JOHN WELDON

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court below held that the Establishment Clause barred a church from maintaining a defamation suit when it was falsely labeled a "cult," even though the word "cult" carries a commonly understood defamatory meaning, and even though the publication specifically listed as among "the characteristics of cults" the engaging in such criminal behavior as prostitution, rape, beating, child molestation, drug smuggling, and murder.

The questions presented are:

1. Whether the First Amendment "ecclesiastical abstention" doctrine, which has only been applied by this Court in church property and church governance disputes, should be extended to impose heightened immunity from defamation liability arising in the context of religion.

2. Whether interpretations of the "ecclesiastical abstention" doctrine that impose heightened immunity from defamation liability arising in the context of religion violate the Free Exercise and Free Speech Clause of the First Amendment by denying to religious litigants access to redress for defamation that would otherwise exist under neutral principles of defamation law.

RULE 14.1(b) STATEMENT

The following entities, who were parties below, are also petitioners in this Court:

Living Stream Ministry

Assembly of the San Gabriellers

Church in Shreveport

The Church in Albuquerque

The Church in Anaheim

The Church in Arcadia

The Church in Atlanta, Inc.

The Church in Baton Rouge, Inc.

The Church in Beaumont

The Church in Bellevue

The Church in Bellingham

The Church in Berkeley

The Church in Birmingham

The Church in Boca Raton, Inc.

The Church in Boise

The Church in Cambridge, Inc.

The Church in Cary

The Church in Cerritos

The Church in Chula Vista

The Church in College Park

The Church in Corpus Christi

The Church in Cypress

The Church in Dallas, Inc.

The Church in Davis

The Church in Denton, Inc.

The Church in Diamond Bar

The Church in Dunn Loring

The Church in El Monte
The Church in Eugene
The Church in Fairborn
The Church in Fort Stockton
The Church in Fort Worth, Inc.
The Church in Fresno, Inc.
The Church in Fullerton Corporation
The Church in Houston
The Church in Huntington Beach
The Church in Huntsville, Inc.
The Church in Irvine, Inc.
The Church in Jackson
The Church in Jacksonville, Inc.
The Church in Kansas City, Inc.
The Church in Lafayette
The Church in Laredo
The Church in Little Rock
The Church in Long Beach
The Church in Los Angeles
The Church in Memphis
The Church in Miami, Inc.
The Church in Milwaukee
The Church in Mission Viejo, Inc.
The Church in Montebello
The Church in Monterey Park
The Church in Moreno Valley
The Church in Nashville
The Church in Newington, Inc.
The Church in North Providence
The Church in Nutley

The Church in Odessa
The Church in Oklahoma City, Inc.
The Church in Orlando
The Church in Palatine
The Church in Plano
The Church in Pleasant Hill
The Church in Portland
The Church in Pullman
The Church in Redding
The Church in Richardson
The Church in Riverside
The Church in Roseville
The Church in Sacramento
The Church in Salt Lake City
The Church in San Antonio, Inc.
The Church in San Diego
The Church in San Francisco, Inc.
The Church in San Jose
The Church in Santa Clara
The Church in Santa Clarita
The Church in Seattle
The Church in Spokane
The Church in Streamwood
The Church in Tacoma
The Church in Tampa, Inc.
The Church in Tempe, Inc.
The Church in Texarkana
The Church in Thousand Oaks
The Church in Torrance
The Church in Tucson, Inc.

The Church in Tulsa

The Church in Tyler

The Church in Victorville

The Church in Vista

The Church in Wichita, Inc.

The Church in Yorba Linda

The Church of God Which is in Philadelphia

The Local Church in El Paso

The Local Church in Raleigh

RULE 29.6 STATEMENT

No petitioner has a parent corporation, and no publicly held company owns 10% or more of any petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners "The Local Church," 95 plaintiff local churches, and Living Stream Ministry, petition this Court for a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas, App., *infra*, 1a-21a, is reported at 190 S.W.3d 204. That Court's order denying petitioners' timely petition for rehearing, App., *infra*, 26a, is unreported. The orders of the Supreme Court of Texas denying review, App., *infra*, 25a, and denying petitioner's timely petition for rehearing, App., *infra*, 27a, are unreported. The trial court's orders denying respondents' motions for summary judgment, App., *infra*, 22a-24a, are unreported.

JURISDICTION

The Court of Appeals of Texas rendered its judgment on January 5, 2006, and denied petitioners' timely petition for rehearing on May 18, 2006. The Texas Supreme Court denied petitioners' timely petition for review on December 1, 2006, and denied petitioners' timely petition for rehearing on February 16, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides: "Congress shall make no law respecting an Establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT

Petitioner The Local Church is a relatively small group of Christian churches. Petitioner Living Stream Ministry is a publisher established to serve those churches and the general Christian public. Respondent Harvest House is a publishing company that published a book written by respondents John

Ankerberg and John Weldon entitled *Encyclopedia of Cults and New Religions*.[1]

The introduction to the *Encyclopedia* states that "the groups contained herein deserve the title 'cult,'" and then attributes certain characteristics to cults, including the alleged practice of engaging in fraud, drug smuggling, prostitution, rape, physical beating, molestation of children, and murder. App., *infra*, 8a-9a. The Local Church is one of the so-called cults described in the *Encyclopedia*, on pages 211-12 of the book. *Id.* at 6a, 20a.

The gist of the defamation claim brought by The Local Church against Harvest House was that the inclusion of The Local Church among the "cults" listed in the *Encyclopedia* was an actionable false statement of fact, because the word "cult" as defined in the opening material of the *Encyclopedia* was not a mere theological pejorative, but rather a shorthand encapsulating the characteristics of groups that engaged in specifically articulated criminal behavior. App., *infra*, 9a, 20a. Harvest House moved for summary judgment three different times before two different judges, and in each instance summary judgment was denied by the trial court. The Texas Court of Appeals reversed, and the Supreme Court of Texas declined review.

Relying on this Court's opinion in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court of Appeals held that the word "cult" was not actionable, reasoning that "[u]nder the Establishment Clause of the

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[1] For brevity, the Petitioners are referred to collectively throughout this Petition as "The Local Church," Respondents collectively as "Harvest House," and the *Encyclopedia of Cults and New Religions* as the "*Encyclopedia*." Although the Petitioner churches regard themselves as "local churches," they and Living Stream Ministry do not refer to themselves collectively as the "The Local Church." The use of that collective term is adopted here as it is used in the *Encyclopedia* to refer to Petitioners.

First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability." App., *infra*, 10a. The court further held that the allegedly defamatory material in the *Encyclopedia* was not "of and concerning" The Local Church.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve The Confusion In The Lower Courts Over The Extent To Which The Establishment Clause Bars The Imposition Of Tort Liability For False And Libelous Statements Of Fact Directed At Religious Groups.

A. The defamation claim of The Local Church and the holding below.

The Local Church was defamed by being labeled a "cult" as that term would have been understood by the ordinary reasonable reader, given the defining language supplied by Harvest House in its description of the "characteristics of cults."

The ruling below artificially dissected the claim of The Local Church in an analysis that arbitrarily segregated the word "cult" from the *Encyclopedia*'s list of specific criminal behaviors defining the characteristics of cults. The court below treated the word "cult" as an exclusively theological term, and as thus insulated from defamation claims by the doctrine of ecclesiastical abstention, and then treated the specific criminal behaviors listed in the *Encyclopedia* as not "of and concerning" The Local Church, and as thus beyond the ken of the defamation claim. App., *infra*, 10a-21a. This was constitutional error.

The word "cult" might be used in some contexts purely as a theological term, expressing opinions that cannot form the predicate for a defamation action. As many courts nationwide have recognized, however, the world "cult" also has a connotation in common language usage and in the public

mind associated with illicit and criminal behavior, such as brainwashing, abduction, physical assault, sexual abuse, suicide, and murder.[2] And the Local Church rested its defamation claim on the fact that this common understanding was reinforced by Harvest House's introductory material, which listed violent criminal behaviors purportedly describing the "characteristics of cults."

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[2] *See Kennedy v. Children's Serv. Soc'y of Wis.*, 17 F.3d 980, 984 (7th Cir. 1994) ("[I]t is clear that Gaunt's statements that the Kennedys were unsuitable parents because they belonged to a cult could give rise to a claim of defamation."); *New Testament Missionary Fellowship v. E.P. Dutton & Co.*, 491 N.Y.S.2d 626, 628 (N.Y. App. Div. 1985) (holding that book describing cults and oppressive practices of cults was actionable, noting that the publication operated to "tar all the groups covered by the book with the same brush, citing language that is libelous *per se*, for example: that they use mind control to ensnare young people 'who sign over their lives and property to con men they have been duped into believing are the Messiah'; 'parents are blackmailed into contributing large sums of money to the cult'" And holding that: "No innuendo is necessary to bring out the defamatory character of such words. It is for a jury to determine whether these words, directed generally to the 'cults' covered in the book, would lead the reasonable reader to believe, in the context of the whole book, that the plaintiffs had indulged in these practices."); *Landmark Educ. Corp. v. Conde Nast Publ'g Inc.*, 23 Media L. Rep. 1283 (N.Y. Sup. Ct. 1994) (holding actionable an article stating that plaintiff is among America's "most wanted cults"); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773 (Tex. App. 1995) (being labeled a "cultist" or "cult-like" held actionable). *But see Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alaska 2001) (holding, in a case that did not involve the type of specific allegations of criminal misconduct at issue in *Harvest House*, that "[i]t is not factually verifiable whether a certain church is a 'cult' or whether church members are 'cult recruiters.' Instead, these are statements of religious belief and opinion.").

The Local Church thus did not argue below, and does not maintain here, that it was defamed *merely* by having been labeled a "cult" by Harvest House. Yet The Local Church has never acquiesced in the claim advanced by Harvest House, and accepted by the court below, that The Local Church's defamation claim rests *either* on the singular word "cult," considered in isolation, or on the explanatory material describing the "characteristics of cults" in terms that include specific criminal behavior, considered in isolation.

To the contrary, the defamation claim of The Local Church rests on the argument that the label "cult" and the specific criminal acts listed as among the characteristics of cults operate *in combination* to defame The Local Church. That combination simultaneously: (1) eliminated any cogent objection that Harvest House was immunized from this defamation claim by the "ecclesiastical abstention" line of Establishment Clause cases; (2) supplied the actionable defamatory content supporting the defamation claim, by basing the claim on objective facts capable of proof or disproof; and (3) rendered the defamatory content "of and concerning" The Local Church.

A chapter in the *Encyclopedia* was dedicated to The Local Church, and the *Encyclopedia* flatly stated that "the groups contained herein deserve the title [cult].'" App., *infra*, 8a. The accusation that The Local Church was a "cult" was thus manifestly "of and concerning" The Local Church. In reaching its judgment that under the Establishment Clause the term "cult" was not actionable, it simply *did not matter* to the court below that the word "cult" often carries a popular connotation associated with criminal activity, or that the introductory material in the *Encyclopedia* contained specific narrowing language that included a catalogue of specific criminal activity defining the characteristics of cults.[3]

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[3] Thus, the opening paragraph of the opinion below purported to encapsulate the ruling by stating: "*Because* we agree that the pas-

Harvest House argued below that the Introduction to the *Encyclopedia* included the caveat that not every cult listed in the volume possessed all the characteristics of cults identified in the Introduction. App., *infra*, 13a-14a. This is beside the point, either as a constitutional or a common-law matter.[4] *All*

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sages in the book *that refer to the church* are not, as a matter of law, *defamatory*, we reverse the judgment of the trial court and render judgment that the church take nothing from the publishers and authors." App., *infra*, 5a (emphasis added). Similarly, in the paragraph of the opinion below that frames the structure and logic of the issues as the court conceptualized them, the court stated:

> In their motion for summary judgment, the publisher and authors argue that the Introduction section of the book cannot be defamatory, as a matter of law, because (1) "the foundational context of the Encyclopedia centers on doctrinal and apologetic issues of theology," and (2) the introduction cannot be reasonably interpreted to defame every group in the book. To determine these issues, we consider first whether the label "cult" is actionable. Then, we turn to the issue of whether the negative attributes and practices attributable to "cults" are actionable.

App., *infra*, 10a. This passage clearly indicates that the court below understood the propriety of granting the motion for summary judgment as turning on the question of defamatory content, a question that was influenced both by whether the *Encyclopedia's* purported "foundational context" "centers on doctrinal and apologetic issues of theology" and by whether being labeled a "cult" and being tarred with the negative attributes and practices attributed to "cults" was actionable.

[4] The lower court's invocation of the so-called "group libel" doctrine, *see* App., *infra*, 14a-16a, 21a, is irrelevant to the constitutional review sought in this Court, and is a doctrinal red herring. At the threshold, this suit was never properly understood as a "group libel" case at all. In a true "group libel" case, a plaintiff who is *not* named in a communication asserts the right to sue for defamatory statements that target a collective group, positing that as a member of the group the plaintiff was individually defamed. See 1 Robert

the groups catalogued in the book must have been understood by the average reader as possessing at least *some* of the articulated "characteristics of cults," or they would not have been included in the book in the first place. Indeed, the reasonable reader would assume that all of the groups possessed such characteristics in sufficient measure to warrant inclusion.

In erroneously bifurcating the claim of The Local Church into two parts, and in erroneously invoking the ecclesiastical abstention line of precedent, the court below unconstitutionally preempted the opportunity of The Local Church to argue to a jury that in the context of the *Encyclopedia*, it was the *secular* meaning of the word "cult" as defined by Harvest House itself that would have been communicated to the average reader.

B. The holding below drew on this Court's "ecclesiastical abstention" cases, all of which have been limited to disputes over church property and church governance.

Relying on *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), one of the landmark cases in this Court's series of "ecclesiastical abstention" rulings, the court below reasoned that "[u]nder the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or

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D. Sack, SACK ON DEFAMATION § 2.9.1, at 2-133 (3d ed. 1999) ("The danger of permitting lawsuits where the plaintiff is *not* specifically identified is particularly acute in the circumstance of 'group libel.'") (emphasis added); *see also Eskew v. Plantation Foods, Inc.*, 905 S.W.2d 461, 462 (Tex. App. 1995). Here, in contrast, The Local Church *was* identified by name as a cult. If the world "cult" is actionable (with its meaning amplified by popular understanding and/or the context supplied by the Introduction to the *Encyclopedia*), then The Local Church is an appropriate plaintiff, and no discussion of "group libel" is required.

making matters of religious belief the subject of tort liability."[5] App., *infra*, 10a.

The ecclesiastical abstention doctrine invoked by the court below traces its beginnings to *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), which posed an oft-recurring question in church disputes: who owns the church after a schism in which the members of the church divide into two distinct bodies? When such a dispute arises, ecclesiastical tribunals will often be the first to rule on the question. In *Watson*, this Court held that "whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." 80 U.S. at 727. The principles announced in *Watson* presaged First Amendment developments, and have now been absorbed into constitutional law as orthodox Establishment Clause doctrine. As *Watson* elegantly explained, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* at 728.

It has long been clear, however, that the core principle articulated in *Watson* does not inexorably divest secular courts of the power to adjudicate disputes involving religious

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[5] In *Milivojevich*, the issue was whether a bishop had been properly removed as head of a diocese, an issue that would determine control of valuable church assets. The Court held that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Milivojevich*, 426 U.S. at 709, *citing Maryland & Virginia Fellowship of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970).

parties in which a claimant seeks the enforcement of ordinary legal rights. In *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), for example, the dispute was over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church. Justice Brandeis, writing for a unanimous Court, rejected the Archbishop's claim that secular courts lacked jurisdiction to adjudicate the issue because the claim implicated "spiritual property of a perpetual character subject to the jurisdiction of the ecclesiastical forum, and that thereby . . . was removed from the jurisdiction of secular courts." *Id.* at 15-16. In so doing, Justice Brandeis explained:

> The objection is not sound. The courts have jurisdiction of the parties. For the archbishop is a juristic person amenable to the Philippine courts for the enforcement of any legal right; and the petitioner asserts such a right. There is jurisdiction of the subject-matter; for the petitioner's claim is, in substance, that he is entitled to the relief sought as the beneficiary of a trust.

Id. at 16. In the subsequent line of decisions navigating between *Watson* and *Gonzales*, this Court has consistently held that the First Amendment *forbids* interpretation by secular courts of theological principles, or inquiries into the truth or falsity of religions claims, but *permits* application of neutral principles of law to adjudicate ordinary legal claims of religious parties. At the heart of this body of law there rests the fundamental principles that (1) secular courts in America may not determine the truth, falsity, or plausibility of a religious claim, but (2) religious institutions, no less than secular institutions, are entitled to enjoy the attention and protection of secular courts with respect to their secular claims.

C. This Court has never extended the ecclesiastical abstention doctrine to arenas outside the narrow domain of church property and governance disputes, much less to defamation law.

This Court has never extended the ecclesiastical abstention doctrine outside the narrow domain of disputes over church property and church governance. Nor should it.

All of the Court's cases applying this doctrine have involved disputes *among competing factions within religious organizations* over ownership of church property and assets, which followed disputes between those factions over who constituted the authentic leadership of the religious body claiming ownership. *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Milivojevich*, 426 U.S. at 709; *Maryland & Virginia Fellowship of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church in the United States v. Mary Elizabeth Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). There is a kind of "spiritual federalism" at work in these ecclesiastical abstention cases, a deference to religious authorities to decide religious controversies.

Religious groups, however, are also part of civil society. Land is land, a trust is a trust, and a bank account is a bank account. Title and ownership must vest somewhere, and civil courts can and must at times adjudicate such property disputes even when the litigants are religious parties. To hold otherwise would deny to religious disputants the ordinary benefits of the rule of law.[6]

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[6] *See, e.g., Jones*, 443 U.S. at 602 ("The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively."), *citing Presbyterian Church*, 393 U.S. at 445.

What is true for the law of property is true for the law of torts. The ecclesiastical abstention doctrine should be kept in alignment with other First Amendment doctrines. In free speech cases, this Court has repeatedly held that journalists are not exempt from generally applicable neutral laws.[7] The same principle applies in the context of religion.[8] The ecclesiastical abstention doctrine should not impose any super-immunity from defamation over and above the neutral rules of civil liability that already apply as a matter of common-law and Free Speech Clause doctrine.

When a church is branded a "cult," and when that branding includes an imputation of purportedly defining characteristics encompassing criminal acts such as prostitution, rape, beating, child molestation, and murder, the ordinary common-law and constitutional law principles governing modern defamation actions provide ample space for a judge and jury to determine liability without encroaching on the spiritual sovereignty of ecclesiastical tribunals, venturing into the in-

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[7] In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), for example, the Court refused to engraft a First Amendment defense onto a promissory estoppel claim brought against a newspaper that violated a promise of confidentiality it had granted to a source. The Court stated that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. *See also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138-40 (1969) (sustaining application of antitrust laws to the press); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-94 (1946) (sustaining application of the Fair Labor Standards Act to the press); *Associated Press v. United States*, 326 U.S. 1, 19-23 (1945) (sustaining application of antitrust laws to the press); *Associated Press v. NLRB*, 301 U.S. 103, 120-21 (1937) (sustaining application of the National Labor Relations Act to the press).

[8] *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-92 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise).

terpretation of religious canon, or engaging in judgments of theology.

D. This Court has previously rejected broad First Amendment immunity from defamation claims.

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court held that the Free Speech Clause does not impose an independent constitutional defense to defamation liability for any statement couched as an "opinion," over and above the core common-law and constitutional doctrines that already have built into them the elemental requirement that defamation liability be predicated on a false statement of fact. *Id.* at 19-20.

This Petition presents the Establishment Clause sequel to *Milkovich*. The Establishment Clause should not be impressed to perform the service that this Court in *Milkovich* held should not be performed by the Free Speech Clause, letting in through the back door a doctrine that this Court has already shut out through the front. The point of *Milkovich* was that the First Amendment does not insulate from defamation liability any statement simply because the statement is couched as "opinion," but rather permits the imposition of liability for statements that may have the trappings of opinion but actually communicate defamatory statements of fact.

No different rule should be imposed under the Establishment Clause. Statements with the trappings of "religious opinion" should not be protected when they are not true "opinions" at all, but rather statements that communicate defamatory statements of fact. To be sure, a defamation suit should not be used as a back-handed vehicle for collateral review of the judgment of a church tribunal on issues of faith and morals. But a defamation suit may be used to determine whether an author has libeled a church, so long as the ordinary rules of defamation law, rules that already require such fundamental elements as a "false statement of fact of and concerning the plaintiff," are satisfied. No theological expo-

sition is required to determine the truth or falsity of the accusation that a church is among a group of cults that engage in prostitution, rape, or murder.

Our system of justice should distinguish between defamation suits and heresy trials. Defamation actions should be governed by *Milkovich*, not *Milivojevich*. In *Milkovich*, this Court held that the Constitution did not require state courts to allow a defendant to escape scot-free from the liability that would attach to an otherwise actionable false statement of fact merely because that statement is embedded within a larger communication couched as "opinion" or "commentary." The Establishment Clause should likewise not be understood to create such a prophylactic zone of immunity for otherwise actionable statements embedded within a larger communication couched as "religious opinion" or "religious commentary."

As many courts nationwide have recognized, in the popular mind the word "cult" has acquired a distinctly negative meaning.[9] This meaning surely does *not* derive from any widespread public understanding regarding the common *theological* traits of cults. Theology and doctrine are not what give cults a bad name. Manifestly, the defamatory character of the word "cult" derives instead from the widespread association of "cults" in the popular mind with illicit and criminal behavior, a defamatory meaning that was specifically reinforced in this case through the *Encyclopedia*'s use of defining language.

The court below accepted and gave dispositive weight to Harvest House's self-serving characterization of its book as centered on religious doctrine and theology. The Local Church disputes the characterization of the *Encyclopedia* as a work of theology, and instead characterizes it as a guide to cults. But in the end, *even if* the *Encyclopedia* is treated as centered on theology, this in no way prevents it from also

[9] See the cases cited in n.2, *supra*.

containing false statements of facts that are actionable as defamation. No amount of inclusion of theological material mutes or masks the hard factual accusation that The Local Church is a "cult" within the meaning of that term as commonly understood by the average reader and as defined by the *Encyclopedia* itself. This label, as used by the *Encyclopedia*, was a defamatory communication carrying secular meaning about—*i.e.*, "of and concerning"—The Local Church.

E. There is a conflict among the lower courts.

Lower courts that have faced the issues raised by this Petition are divided, and lower court doctrine is in disarray. The Supreme Courts of Virginia, Montana, and Oklahoma, the United States Court of Appeals for the Sixth Circuit, and numerous lower state and federal courts, follow the approach of the court below, treating the Religion Clauses and the principle of ecclesiastical abstention as imposing heightened standards that prohibit or significantly frustrate efforts by plaintiffs to adjudicate defamation claims arising in religious contexts. In contrast, the highest courts of Iowa, Massachusetts, Pennsylvania, and the District of Columbia, along with numerous lower state and federal courts, follow the position advocated in this Petition.

In *Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511, 516 (Va. 2001), the Supreme Court of Virginia dealt with a defamation claim in which a church pastor was defamed by a church deacon's statement that the plaintiff "borrowed over $100,000 from believers and has not returned the money." *Id.* at 609. Notwithstanding that such a defamatory allegation of financial misconduct would normally be treated as "defamation per se" under Virginia law, the court held the action absolutely barred by ecclesiastical abstention principles, taking the extreme position that the Free Exercise Clause "divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials." *Id.* at 615. The Supreme Court of Montana in *Rasmussen v. Bennett*, 741 P.2d 755, 758-59

(Mont. 1987), held that it would violate the Free Exercise Clause to allow an action for libel or slander to proceed in a case involving accusations of adultery by a church member. In *Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992), the Supreme Court of Oklahoma rejected tort claims by terminated church members, including defamation claims arising from allegedly false charges of fornication allegedly published to persons outside the church, holding that "[w]ithin the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by secular authority." *Id.* at 987.

In *Yaggie v. Indiana-Kentucky Synod, Evangelical Lutheran Church in America*, 64 F.3d 664 (Table), 1995 WL 499468 (6th Cir. Aug. 21, 1995), the Sixth Circuit held that the Religion Clauses erected a jurisdictional bar to adjudication of a defamation dispute arising in a religious context, even though the defamatory statements included statements that would clearly have been otherwise actionable, such as statements that the plaintiff should seek psychiatric treatment. The Sixth Circuit gleaned its absolutist position from this Court's holdings in cases such as *Milivojevich*, *Gonzalez*, and *Presbyterian Church*, treating those cases as divesting federal courts of the power to hear defamation claims arising from statements made in the context of religious disputes *even when* "'the alleged defamatory statements do not express any religious principles or beliefs.'" 1995 WL 499468, at *3, *quoting Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F. Supp. 1194, 1199 (W.D. Ky. 1994). Numerous lower courts similarly adopt the position that the Religion Clauses impose such sweeping immunity from defamation claims.[10]

[10] In *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. App. 1989), the court held that a plaintiff priest had pleaded facts sufficient to support causes of action for defamation, invasion of privacy, and intentional infliction of emotional distress against a defendant bishop, arising from allegedly false accusations leveled against the priest by the bishop. The court held that the Religion Clauses

Standing in conflict with the rulings and rationales identified above, the Supreme Court of Iowa in *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa), *cert. denied*, 540 U.S. 977 (2003), dealt with a defamation action brought by member of a church against a

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would not bar the imposition of tort liability for tortious activity predicated on physical harm, such as battery or false imprisonment. *Id.* at 761. The court held, however, that causes of action such as defamation were barred by the Religion Clauses of the First Amendment, even though they would otherwise constitute actionable civil wrongs. *Id.* In *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993), the court invoked the doctrine of ecclesiastical abstention to bar a defamation claim that was based in part on the statement that the plaintiff had engaged in "[d]irect fabrication of lies with the intent to hurt the reputation and the establishment" of the Church, noting that while the statement was "unrelated to church doctrine on its face," the statement nevertheless related to the Church's reasons and motives for terminating the plaintiffs from the church, and was thus rendered not actionable under the Religion Clauses. In *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. Ct. Spec. App. 1996), a Maryland Court noted the lack of guidance from this Court, observing that "[t]he Supreme Court cases have not, themselves, involved situations like that now before us—a suit for money damages based on a tort such as defamation—but rather have concerned, more directly, issues of church structure, governance, or property, including the selection of clergy." *Id.* at 811. The court dismissed a defamation claim arising from allegations of sexual misconduct by a priest, stating that "[n]onetheless, the withdrawal of ecclesiastical controversies from civil jurisdiction has been a broad one," citing with approval decisions following the absolutist approach, such as the decision of the Sixth Circuit in *Yaggie*. *Id. See also Klagsbrun v. Va'ad Harabonim of Greater Monsi*, 53 F. Supp. 2d 732, 741 (D.N.J. 1999); *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253 (Ind. Ct. App. 1999); *McManus v. Taylor*, 521 So. 2d 449, 451 (La. Ct. App. 1988).

church leader that arose from strife within the church. The church leader, a minister, had defamed the church member by referring to him as "the spirit of Satan" in a letter that was circulated outside the confines of the church to the general public within the local community. *Id.* at 405. The Iowa Supreme Court rejected the claim that the phrase "the spirit of Satan" was a "purely ecclesiastical term, deriving its meaning from religious dogma." *Id.* at 406.

The court noted that as a general rule secular courts have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies, including membership in a church organization, but they do have jurisdiction as to civil, contract, and property rights which are involved in or arise from a church controversy. Thus, Iowa's courts could not entertain a case that involved solely the discipline or excommunication of the church member. Nor, the court held, would the libel claim brought by the plaintiff have been viable had the matter been divulged solely to the members of the church itself. But the fact that the defamatory letter was published outside the congregation, the court reasoned, weakened this ecclesiastical shield. The Iowa Court held that the critical question was whether the phrase "spirit of Satan" could also have a secular meaning "that could be applied in a civil suit for defamation without treading on—or wading into—religious doctrine." *Id.* at 407-08. The court held that, while the term may have had religious roots, it also carries a common, and largely unflattering, secular meaning.[11] The court accordingly held that the case should proceed to a jury trial.

So too, in *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985), the Supreme Judicial Court of Massachusetts held that "[u]nder the banner of the First Amendment provisions on religion, a clergyman may not with impunity defame a person,

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[11] *Id.* at 408, *citing Johnston v. Luebbers*, 288 F.3d 1048, 1061 (8th Cir. 2002); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385, 388 (Ohio Ct. App. 1997).

intentionally inflict serious emotional harm on a parishioner, or commit other torts. The First Amendment religion provisions contain two concepts, 'freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'" *Id.* at 726-27, *quoting Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).[12]

The decision below is similarly in conflict with the principles announced by the Supreme Court of Pennsylvania in *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975), in which the court held cognizable various tort claims arising from a religious shunning, holding that the "'shunning' practice of appellee church and the conduct of the individuals may be an excessive interference within areas of 'paramount state concern,' *i.e.*, the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth May have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." *Id.* at 107.

Similarly, the District of Columbia Court of Appeals in *Lipscombe v. Crudup*, 888 A.2d 1171 (D.C. 2005), held that *Milivojevich* and related ecclesiastical abstention cases did not bar a defamation action arising from a church dispute, holding that the "otherwise religious relationship" of a pastor to a church member did not immunize the pastor from allegations of "'secular behavior' tortious in nature" (in that case,

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[12] *But see Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-38 (Mass. 2002) (in a defamation claim brought by an Episcopal priest arising from statements accusing him of adultery and sexual misconduct, the court held that if the defamatory statement arises in the direct context of internal disciplinary procedures implicating the church-minister relationship, an absolute bar to defamation claims exists.).

allegations that defendant had committed sexual harassment). *Id.* at 1174.

Numerous lower court decisions similarly support the position advanced by The Local Church in this Petition.[13] In

[13] The court in *House of God Which is the Church of the Living God, the Pillar and Ground of the Truth Without Controversy, Inc. v. White*, 792 So. 2d 491 (Fla. Dist. Ct. App. 2001), held that a defamation action against a pastor was not barred when the pastor accused a church member of being a "slut" in the presence of other clergypersons and parishioners while they stood at the church altar, noting that it was "well-settled that a court may hear an action if it will involve the consideration of neutral principles of law." *Id.* at 493. *See also Briggs & Stratton Corp. v. Nat'l Catholic Reporter Publ'g Co.*, 978 F. Supp. 1195, 1198 (E.D. Wis. 1997) ("After considering the defendants' arguments and authorities this court finds that it has subject matter jurisdiction over this lawsuit. Disposition of this suit will not inevitably involve analysis of church teachings and policies. Most of the statements at issue address the plaintiff's present and future business decisions, as well as the social and economic consequences of those actions. Analysis of these issues will involve the application of 'neutral principles of law,' and to that extent excessive government entanglement with religion need not result. . . . [T]o the extent that the articles can be construed as charging the plaintiffs with dishonorable or unethical conduct in their business operations, not related to religion per se, their claims will go forward."); *LeGrande v. Emmanuel*, 889 So. 2d 991, 994 (Fla. Dist. Ct. App. 2004) (reversing dismissal of defamation lawsuit that was based in part on defendants' assertion that the plaintiffs, a minister and his wife, had used money stolen from their church to buy a luxury automobile, because the "suit involve[d] a neutral principle of tort law that does not involve 'excessive' entanglement in internal church matters or in the interpretation of religious doctrine or ecclesiastical law"); *Callahan v. First Congregational Church Of Haverhill*, 808 N.E.2d 301, 313-14 (Mass. 2004) (differentiating between claims that were inextricably related to the Church disciplinary process, and thus outside the jurisdiction of a secular court, and allegations outside the church disciplinary process that could be actionable); *Holy Spirit*

at least one case rendered since *Harvest House*, a lower court has distinguished and refused to follow the decision below. In *Dr. R.C. Samanta Roy Inst. of Sci. & Tech., Inc. v. Lee Enters., Inc.*, 2006 WL 3692361 (E.D. Wis. 2006), the court characterized *Harvest House* as "holding that the act of labeling the church as a 'cult' in the book's introduction was not actionable as libel, because the truth or falsity of the statement depended upon one's religious beliefs, which was an ecclesiastical matter that could not be tried in a court of law," and refused to follow the decision, holding instead that in context before it the word "cult" could be actionable, and noting that "a decision of the Seventh Circuit, which is binding on this court, holds that stating that one belongs to a cult can give rise to a claim of defamation." *Id.* at *3, *4.

This Court's guidance is much-needed. The Court's intervention will serve the national interest in sound application of the First Amendment, and serve the interests of churches and religious organizations in the fair and even-handed application of defamation laws.

Ass'n for Unification of World Christianity v. Harper & Row, Publishers, Inc., 420 N.Y.S.2d 56, 60 (N.Y. Sup. Ct. 1979) ("The court agrees with plaintiffs that where the issue involves the validity of a religious denomination's beliefs, the First Amendment would bar such a claim, as it would embroil the state in an inquiry into the truth or falsity of beliefs or teachings; however, the alleged libelous statements involved in the case at bar do not involve the validity of beliefs and practices. The author is not concerned with whether the Reverend Sun Myung Moon is the true Messiah or whether the teachings of the Church are the word of God or the word of the Devil. The case is analogous to a situation where a given Church would be charged with taking its members money and lining the pockets of its clergy. It is a far cry from a situation where a state cannot refuse to license a motion picture on the ground that it is sacrilegious, to say that a religious institution is barred from bringing any claim for defamation.").

II. This Case Provides An Appropriate Vehicle For This Court To Resolve The Conflict Among The Lower Courts And To Repudiate Interpretations Of The Establishment Clause That Penalize Religious Plaintiffs And Place The Ecclesiastical Abstention Doctrine In Unnecessary Tension With The Free Exercise And Free Speech Clauses.

A. Sweeping Establishment Clause immunity may violate the Free Exercise and Free Speech Clauses.

In wrongly treating the Establishment Clause as imposing sweeping immunity from defamation rules that would otherwise apply, lower courts do more than simply extend the ecclesiastical abstention doctrine beyond its normal reach. To the extent that such decisions treat the religious subject matter of the dispute or the religious identity of the plaintiff as factors that influence the judgment about whether factual assertions are actionable, the decisions violate the nondiscrimination principles of the Free Exercise and Free Speech Clauses. And to the extent that the importation of the ecclesiastical abstention doctrine warps the application of defamation law principles that would otherwise apply, such decisions upset the carefully calibrated balance between the vindication of individual reputation and the preservation of robust public discourse that has evolved under the free speech principles emanating from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and it progeny.

Religious plaintiffs are as much entitled to the protections of the neutral principles of defamation law as nonreligious plaintiffs. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). This Court has on many occasions held that the Establishment Clause may not be invoked to justify discrimination against religious groups.[14] When

[14] *See, e.g., Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*,

courts treat as somehow "special" defamatory statements arising in the context of religion, the potential perils extend beyond mere Establishment Clause overkill. By treating the *religious content* of a defamation suit or the *religious identity* of a plaintiff as the triggers for super-insulating protection, courts violate the Free Exercise and Free Speech Clauses.[15]

In its modern defamation law decisions this Court has sought to strike the appropriate balance between our nation's robust commitment to freedom of speech and the vital interests served by defamation law, which this Court has described as reflecting "no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Lower court decisions that penalize a defamation plaintiff because of plaintiff's religious identity or the general religious context in which the offending defamatory statements arose gratuitously inject an element of viewpoint discrimination into defamation law doctrine that violates well-established Free Speech Clause principles. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Just as a dispropor-

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508 U.S. 384, 393-94 (1993); *Bd. of Educ. of Westside Cmty. Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

[15] If, for example, the book here had been the "Encyclopedia of Violent Gangs," and its opening passages had characterized "violent gangs" as engaging in activity such as prostitution, rape, beating, child molestation, drug smuggling, or murder, standard common-law and constitutional doctrines would not have mandated dismissal. Similarly, if the book had been the "Encyclopedia of Terrorist Groups," and its opening passage had defined terrorist groups as engaging in a similar litany of criminal behaviors, standard doctrines would not have mandated dismissal. No different result should obtain when the book is an encyclopedia of cults.

tionate concern for the Establishment Clause could not justify denying to a student religious group its fair share of a state university's funding for student organizations and publications, a disproportionate concern for the Establishment Clause cannot justify denying to a defamation plaintiff its fair share of access to a state's civil justice system and the protection of its defamation laws. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.").

Sound common-law and constitutional law principles already adequately distinguish between, on the one hand, objectively provable or disprovable statements of fact, which are actionable as defamation, and, on the other hand, the figurative, hyperbolic, or subjective characterization that are not actionable. The cornerstone principle that secular courts may not adjudicate theology, interpret religious canon, or predicate legal liability on religious belief is not at all compromised by the sound application of ordinary neutral rules of defamation law.

There *may be* cases, of course, in which the naked claim that a religious group is a "cult" would require a court to venture into religious theology, doctrine, or belief.[16] But the set of such cases is exactly coterminous with the set of cases that the common law and the Free Speech Clause would already reject as not properly based on "false statements of fact." *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).[17] The point here is that there will *also* be cases in

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[16] *See Jones v. Wolf*, 443 U.S. at 604 ("This is not to say that the application of the neutral-principles approach is wholly free of difficulty.").

[17] The ecclesiastical abstention doctrine ought not be extended to defamation cases at all. But if the doctrine is applied to defamation cases, then its application should be limited, at most, to defamation

which the accusation that a religious group is a "cult" (or some similar pejorative) does not, in context, implicate religious theology, doctrine, or belief *at all*, because in context the reasonable reader could and would conclude that the language used was selected to communicate factual attributes—such as engaging in specifically articulated criminal activity—that may be objectively proved or disproved as true or false. In such cases, the Establishment Clause does not require the construction of a super-barrier to liability, and the Free Exercise and Free Speech Clauses affirmatively forbid that construction.

B. This case is an appropriate vehicle for resolving the split among the lower courts and bringing much-needed clarity to First Amendment doctrine.

This case presents an appropriate vehicle for resolving the split among lower courts. The judgment below was an amalgam of Establishment Clause interpretation, applying the ecclesiastical abstention doctrine, and application of the "of and concerning" doctrine of defamation law, which in its modern form is itself a blend of common-law and Free Speech Clause doctrines. In artificially dividing the claim of The Local Church as it did, treating the word "cult" as severable from the "characteristics of cults," and in turn invoking the Establishment Clause to immunize Harvest House from liability for its use of the word "cult," the court below placed itself squarely within that group of lower courts that have

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actions that arise from statements made internally within a church tribunal or church governing process by the participants in that tribunal or process. When, as here, the defamatory statement arises entirely outside church tribunals and the processes of church governance, there is simply no cogent argument for invoking a doctrine designed to ensure that secular courts do not second-guess religious authorities on their "adjudication" of matters theological.

wrongly extended the concept of ecclesiastical immunity beyond its appropriate confines.

Cases that define the contours of the ecclesiastical abstention doctrine will always, by definition, present the intersection of constitutional law and non-constitutional law principles. That, indeed, is the basic focus of the doctrine—the determination of the extent to which secular courts can or cannot resolve a dispute through the application of neutral legal principles that will not ensnare them in review of ecclesiastical determinations.

When the ecclesiastical abstention doctrine is invoked in the context of modern defamation suits, the interplay of constitutional and non-constitutional doctrines is likely to be constantly present in yet a second sense, because modern defamation law has itself been heavily "constitutionalized." As defamation law has evolved in the wake of *New York Times Co. v. Sullivan*, many elements of the common-law cause of action for defamation are now an amalgam of common-law and constitutional law doctrine. Indeed, this is true of the very common-law doctrine that comprised part of the judgment below, the "of and concerning" requirement, which is now a doctrine of constitutional dimension.[18]

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[18] Since *New York Times Co. v. Sullivan*, a large part of modern defamation law has become an amalgam of constitutional law and common-law principles. In a wide variety of defamation-law contexts (as well as in the various privacy torts that are cousins to defamation), courts often treat common-law and constitutional-law doctrines as co-mingled, making adjustments to tradition common-law doctrines on the assumption that the gravitational pull of First Amendment requires them. Issues concerning "defamatory meaning" and the "of and concerning" doctrine partake of this intermingling. Thus, while the common law did not allow a defamation suit to be predicated on mere insult or hyperbole, this rule is now also understood as mandated by the First Amendment itself. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6 (1970). The same forces are at

This Court can and should grant review of decisions at the intersection of federal constitutional law and state common-law doctrines to resolve lower court conflicts and repudiate errant constitutional interpretations that operate to frustrate or deny litigants the common-law protections that they would otherwise enjoy. This principle was applied most famously in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the Court held:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law.

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work with the "of and concerning" requirement. While historically this was a basic element of the common-law tort of defamation, it is now a doctrine of constitutional stature. *See, e.g., Rosenblatt*, 383 U.S. at 82; *Sullivan*, 376 U.S. at 292. Lower courts routinely treat the "of and concerning" doctrine as a constitutional requirement. *See, e.g., Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1044-45 (C.D. Cal. 1998); *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 933, 937 (E.D. Wash. 1992); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986). Normally, the constitutional elements of the doctrine operate as a First Amendment "floor," prohibiting the imposition of defamation liability as a matter of constitutional law when the defamatory material is not "of and concerning" the plaintiff. Yet as this Court made clear in *Milkovich*, this Court will also review defamation rulings that impose *more* First Amendment protection than is constitutionally required. *See Milkovich*, 497 U.S. at 19-20.

Id. at 568.

The rationale for granting review here is even stronger than in *Zacchini*. Here, the claim is not simply that lower courts are in conflict in their interpretation of the reach of the ecclesiastical abstention doctrine. Rather, the claim is that those lower courts on the side of this conflict that have indulged in an excessive interpretation of the ecclesiastical abstention doctrine are perniciously denying religious litigants the access to neutral principles of defamation law that they would otherwise enjoy, violating their rights under the Free Exercise and Free Speech Clauses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2007